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Upmarket Development Sdn Bhd v Sriera Development Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–16 OF 2010 (B)
ALAUDDIN PCA, RAUS SHARIF AND ABDULL HAMID EMBONG FCJJ
9 MAY 2011

Land Law — Caveats — Removal of — Boundary of land adjoining appellant's lot unclear — Plan of land showed boundary overlapped with portion of appellant's lot — Construction works on land covered overlapped portion — Appellant lodged caveat on adjoining land but limited to protect interest in overlapped portion — Form 19B used to lodge caveat out-dated and defective — Whether deviation in Form substantial and prejudicial — Whether there was substantial compliance with requirements of Form 19B — Whether in removal of caveats balance of convenience or justice must be considered

The respondent, a housing developer, entered into a joint venture agreement with the owner of a piece of land ('the land') to develop into a housing estate. The land bore a provisional title and had not been properly surveyed to demarcate its exact boundary. The plan annexed to the title showed that the boundary of the land overlapped with a portion of the appellant's land. The respondent's construction works covered that portion of the land claimed by the appellant. The appellant lodged a caveat against the whole of the land to protect its interest pending resolution of the dispute in court. At first instance, the High Court allowed the respondent's application to remove the caveat without considering the issue of the overlapping boundary. The appellant's appeal to the Court of Appeal against that decision was dismissed. The court held the Form 19B the appellant had used to lodge the caveat was defective for failing to expressly state therein that the caveat was to bind only that portion of the land which overlapped the appellant's land. Because of that failure, the court held, the appellant had caveated that portion of the land over which it had no caveatable interest. The court so held despite finding that the appellant had described the nature of its claim by identifying clearly the lots affected by the overlapping and despite the appellant's explanation that the caveat was to protect the overlapped portion only. The appellant appealed the decision to the Federal Court. In the Federal Court the respondent submitted that the caveat was not only defective in form but also uncertain and confusing in its effect as to whether it bound the whole of the land or just a particular interest, that it prejudiced the respondent and ought to be removed. As to formal defect it was submitted that the Form 19B used was out dated, failed to contain para 3(c) of s 323 of the National Land Code, failed to denote deletion of either of the

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words 'tanah sendiri' or 'kepentingan' and contained the insertion of the word 'semua' instead of 'sebahagian' in the fourth column of its schedule. A

Held, allowing the appeal with costs and setting aside the orders made in the courts below:

B

(1) A careful perusal of both the Form 19B and the statutory declaration accompanying it showed the appellant had substantially complied with the requirements of Form 19B. In the statutory declaration accompanying the Form 19B the appellant had clearly described that his claim was only to protect the overlapping part of the land and he had submitted a plan which clearly identified that part of the land affected (see paras 26 - 27). C

(2) The deviation due to the failure to describe the land in the form itself was not a ground to invalidate the Form. The respondent was neither prejudiced nor misled by the deviation. The deviation had no substantial effect (see para 27). D

(3) Section 62 of the Interpretation Acts 1948 and 1967 provided that usage of a form that deviated from any prescribed form shall not be invalidated by reason only of the deviation if the deviation had no substantial effect and was not calculated to mislead. Such was the state of the appellant's Form 19B (see para 28). E

(4) A liberal and progressive approach should be taken in the interpretation of caveat forms. The accompanying statutory declaration may be looked at to determine the form's actual purport. The form should not be viewed in isolation. The court should place more weight to the substance rather than the form (see para 33). F

(5) Since a caveat resembled an equitable remedy it was inappropriate to apply a rigid and ritualistic approach to caveats. A better approach was the 'in the best interest of justice' approach as taken in Australia and New Zealand where the torrens system also operated. Case laws from both those countries have held that substantial compliance with the relevant form was sufficient and that a slavish adherence to prescribed form was not required (see paras 16, 31 & 32). G H

(6) There was serious misdirection on the part of both the courts below in failing to give any consideration to the balance of convenience (balance of justice) test in removing the appellant's caveat (see paras 34 & 35).

(7) A caveat was in essence a temporary equitable remedy, like an interim injunction, to maintain the status quo of the parties. As such, the balance of convenience factor should be considered and determined upon any application for its removal. Having determined that the appellant possessed a caveatable interest and that there was a serious question to be I

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tried, the courts below should have proceeded to enquire if the balance of justice favoured the caveat remaining on the register pending disposal of the action (see paras 34 & 36).

[Bahasa Malaysia summary

Responden, pemaju perumahan, memasuki perjanjian bersama dengan pemilik sebidang tanah ('tanah tersebut') untuk dibangunkan menjadi estet perumahan. Tanah tersebut mempunyai hak milik sementara dan belum lagi diukur dengan betul untuk menandakan sempadan yang sebenar. Pelan yang dilampirkan kepada hak milik menunjukkan bahawa sempadan tanah tersebut bertindan dengan sebahagian tanah perayu. Kerja-kerja pembangunan responden meliputi bahagian tanah yang dituntut oleh perayu. Perayu memasukkan kaveat ke atas keseluruhan tanah tersebut untuk melindungi kepentingan sementara menunggu penyelesaian pertikaian di dalam mahkamah. Pada mulanya, Mahkamah Tinggi membenarkan permohonan responden untuk mengeluarkan kaveat tanpa mengambil kira isu sempadan bertindan. Perayu merayu ke Mahkamah Rayuan terhadap keputusan yang ditolak. Mahkamah memutuskan bahawa Borang 19B yang digunakan perayu untuk memasukkan kaveat adalah cacat kerana gagal untuk menyatakan di dalamnya bahawa kaveat mengikat bahagian tanah yang bertindan dengan tanah perayu. Oleh sebab kegagalan tersebut, mahkamah memutuskan, perayu telah mengkaveatkan bahagian tanah yang mana ia tiada kepentingan yang boleh dikaveat. Mahkamah memutuskan sedemikian walaupun mendapati bahawa perayu telah menyatakan sifat tuntutannya dengan mengenalpasti secara jelas lot-lot yang terjejas oleh pertindanan dan walaupun penjelasan perayu bahawa kaveat adalah untuk melindungi bahagian bertindan sahaja. Perayu kemudiannya merayu keputusan ke Mahkamah Persekutuan. Di Mahkamah Persekutuan, responden menghujahkan bahawa kaveat bukan sahaja cacat di dalam borang tetapi juga tidak jelas dan mengelirukan dalam efeknya sama ada ia mengikat keseluruhan tanah atau sebahagian kepentingan, bahawa ia memprejudiskan responden dan sepatutnya dikeluarkan. Mengenai kecacatan formal, dihujahkan bahawa Borang 19B yang digunakan adalah ketinggalan zaman, gagal mengandungi perenggan 3(c) Kanun Tanah Negara, gagal untuk merujuk pemotongan salah satu perkataan 'tanah sendiri' atau 'kepentingan' dan mengandungi kemasukan perkataan 'semua' dan bukan 'sebahagian' dalam ruang keempat jadualnya.

Diputuskan, membenarkan rayuan dengan kos dan mengetepikan perintah-perintah Mahkamah Rayuan dan Mahkamah Tinggi:

(1) Satu penelitian yang cermat kedua-dua Borang 19B dan deklarasi statutori bersamanya menunjukkan perayu telah secara substansial memenuhi syarat Borang 19B. Dalam deklarasi statutori bersama Borang 19B, perayu telah menggambarkan dengan jelas bahawa tuntutannya hanyalah untuk melindungi bahagian tanah yang bertindan dan dia telah

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mengemukakan pelan yang dengan jelas mengenalpasti bahagian tanah yang terjejas (lihat perenggan 26 – 27).

(2) Kelainan kerana kegagalan untuk menggambarkan tanah tersebut dalam borang itu sendiri bukan alasan untuk menjadikan borang tersebut tidak sah. Responden tidak diprejudis mahupun keliru oleh kelainan itu. Kelainan tersebut tiada kesan substansial (lihat perenggan 27).

(3) Seksyen 62 Akta Tafsiran 1948 dan 1967 memperuntukkan bahawa penggunaan borang yang lain daripada borang yang sepatutnya tidak akan menjadikan ia tidak sah dengan syarat kelainan tiada kesan substansial dan bukan bertujuan untuk mengelirukan. Demikian adalah keadaan borang 19B perayu (lihat perenggan 28)

(4) Pendekatan yang liberal dan progesif seharusnya diambil dalam menafsir borang-borang kaveat. Deklarasi statutori yang disertakan bersama boleh dirujuk untuk menentukan tujuan sebenar borang. Borang tersebut tidak seharusnya dirujuk bersendirian. Mahkamah seharusnya meletakkan pertimbangan kepada isi hal berbanding borang tersebut (lihat perenggan 33).

(5) Memandangkan kaveat menyerupai remedi berasaskan ekuiti, adalah tidak sesuai untuk menggunapakai pendekatan yang ketat dan berbentuk ritual ke atas kaveat. Pendekatan yang lebih baik adalah pendekatan 'dalam kepentingan terbaik keadilan' yang diambil oleh Australia dan New Zealand di mana sistem torrens juga beroperasi. Kes undang-undang daripada negara-negara tersebut telah memutuskan bahawa ketidakpatuhan substansial terhadap borang yang relevan adalah mencukupi dan bahawa pematuhan yang ketat kepada borang yang ditetapkan tidak diperlukan (lihat perenggan 34)

(6) Terdapat salah arah yang serius di kedua-dua mahkamah rendah dalam kegagalan memberi pertimbangan kepada ujian imbangan kesenangan (imbangan keadilan) dalam mengeluarkan kaveat perayu (lihat perenggan 23 & 24)

(7) Kaveat, pada asasnya, adalah remedi ekuiti, seperti injunksi interim, untuk mengekalkan status quo pihak-pihak. Oleh itu, faktor imbangan kesenangan mestilah diambilkira dan diputuskan dalam mana-mana permohonan untuk mengeluarkannya. Setelah diputuskan bahawa perayu memiliki kepentingan yang boleh dikaveat dan bahawa terdapat persoalan serius yang perlu dibicarakan, Mahkamah Tinggi dan Mahkamah Rayuan seharusnya mempersoalkan sama ada keseimbangan keadilan berpihak kepada kaveat yang masih wujud pada pendaftaran menunggu penyelesaian bagi tindakan (lihat perenggan 34 & 36)]

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Notes

For a case on removal of caveats, see 8(1) Mallal's Digest, (4th Ed, 2011 Reissue) para 2498.

Cases referred to

Infra Elite Development Sdn Bhd v Pacific Treasure Land Sdn Bhd [2002] 6 MLJ 545, HC (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345, FC (refd)

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212, PC (refd)

HSBC Bank (M) Bhd v Asia Transport Service (M) Sdn Bhd [2001] 5 MLJ 94, HC (refd)

Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782, CA (refd)

Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd [1984] 1 MLJ 115; [1984] 1 CLJ (Rep) 363, FC (refd)

Tan Heng Poh v Tan Boon Then Long & Ors [1992] 2 MLJ 1; [1992] 1 CLJ 316, CA (refd)

Vangadeselam v Mahadevan & Anor [1976] 2 MLJ 161, FC (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 62

National Land Code 1965 ss 207, 322, 322, (1), (2), 323(1), (3)(c), 327(1), Form 19B

Rules of the High Court 2 r 3

Appeal from: Civil Appeal No. B-02-897 of 2007 (Court of Appeal, Putrajaya)

WSW Davidson (S Selvaraj, Chan Yew Hoong and M Nagaletchimy with him) (Fernandez & Selvarajah) for the appellant.

Jenny Lee (Masitah Alias with her) (Hazidin & Chan) for the respondent.

Abdull Hamid Embong FCJ (delivering judgment of the court):

[1] Two questions of law were posed for our determination, namely:

(a) Whether a boundary dispute over a portion of the land between two neighbouring lots which involves the physical aspect of the land ie the actual size and not the ownership, rights, title or interest registrable in the document of title, can give rise to a caveatable interest.

(b) Whether a caveator who is claiming a title and/or interest in respect of a part of a land:

(i) who has described the nature of his claim;

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(ii) who has explained that the caveat applied for was to protect only that part of the land

is further required by s 322 (1) of the National Land Code 1965 to expressly state in Form 19B that the caveat was to bind only that part of the land.

BACKGROUND FACTS

[2] The defendant (the appellant in the present appeal) was the registered proprietor of several pieces of land which was derived from the subdivision of a larger lot known as Lot No 16245, Mukim Petaling, Daerah Kuala Lumpur.

[3] The appellant's land adjoined Lot PT 5105 whose proprietor was Zuhrah Bina Sdn Bhd ('Zuhrah Bina'), a construction firm. Zuhrah Bina had entered into a joint venture agreement with the plaintiff (the respondent herein), a housing developer, to develop Lot PT 5105 into a housing estate.

[4] The appellant alleged that the respondent had obtained a development order from the relevant authority based on the title of Lot PT 5105, a provisional title which had not been properly surveyed to define its exact boundary. The boundary of Lot PT 5105 as shown in the plan annexed to the title had overlapped with a portion of the appellant's land.

[5] The respondent however began development on Lot PT 5105 relying on the demarcation of boundary in the provisional title to demarcate its area of development. It had laid sewage pipes, constructed manholes and driven concrete piles on the portion claimed by the appellant.

[6] To protect its interest pending the resolution of the dispute by the court, the appellant lodged a caveat on Lot PT 5105 ie a caveat against the whole of the respondent's land.

FINDINGS IN THE HIGH COURT

[7] At the High Court, the respondent applied under s 327(1) of the National Land Code 'NLC' to remove the caveat as a person aggrieved by the existence of the caveat by reason of its interest in the land under the joint venture agreement it had entered into with Zuhrah Bina.

[8] The main issues for the determination of the High Court were pertaining to the locus of the respondent to make the application to remove the caveat entered by the appellant on the land and whether the question of the overlap of the boundary between the appellant's land and the land on which the

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respondent carried out the construction work gave the appellant a caveatable interest to lodge a caveat on the said land.

[9] The High Court allowed the respondent's application to remove the caveat without adverting to the issue of the overlapping boundary.

FINDINGS IN THE COURT OF APPEAL

[10] At the Court of Appeal, the appellant's appeal was dismissed on the ground that the appellant's Form 19B was defective since the appellant had failed to express in that form that the caveat was to bind only the small portion of Lot PT 5105 which overlapped the appellant's lots ie the portion on which the appellant claimed an interest. The Court of Appeal found that:

> We have examined Form 19B which the appellant submitted with care. We are convinced that while the appellant had described the nature of its claim by identifying clearly the lots affected by the overlapping and had explained that the caveat applied for on Lot PT 5105 was to protect the overlapped portion, it failed to 'express' therein that the caveat was to bind only that small portion of Lot PT 5105 which overlapped the appellant's lots. By failing to do so, it is clear that the appellant had caveated that portion of the respondent's land which it had no caveatable interest.

[11] That the appellant has a caveatable interest is not in dispute. Indeed the Court of Appeal had found so. As such question one as posed need not be answered since by consent of both parties it is now not in issue.That the appellant has a caveatable interest is not in dispute. Indeed the Court of Appeal had found so. As such question one as posed need not be answered since by consent of both parties it is now not in issue.

[12] In dismissing the appellant's appeal the Court of Appeal had relied on *Tan Heng Poh v Tan Boon Thong & Ors* [1992] 1 MLJ 1; [1992] 1 CLJ 316, where the Supreme Court held that 'the registrar is now prevented from entering a caveat whether expressly intended to bind the land or merely a particular interest therein, if the caveator's claim under s 323(1) relates to only part of the land'.

[13] This case was decided on the then existing s 322(1) of the NLC (covering the period 1985–2001 vide A 587/84) which we now quote:

> 322 Nature and effect of private caveats —
>
> (1) A caveat under this section shall be known as a 'private caveat', and —
>
> (a) May be entered by the Registrar on the register document of title to any land at the instance of any of the persons or bodies specified in section 323;

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(b) Shall have the effect specified in sub-section (2) or (3), accordingly as it is expressed to bind the land itself or an undivided share in the land are merely a particular interest therein.

Provided that such a caveat shall not be capable of being entered in respect of part of the land.

[14] The proviso to that section which we underscored was inserted on 25 March 1985 (vide A587/84) pursuant to the leading Federal Court case of *N Vangedaselam v Mahadevan & Anor* [1976] 2 MLJ 161 where Suffian LP made the following observation on the constraint on a caveator under s 322(1) of the NLC (prior to the first amendment vide A 587/84). What the Lord President observed is, in our view, a precursor of the present position of the law. He said this:

> I am of the opinion that under that code (the NLC) also, you either caveat the whole land or not at all, and that if you claim a registrable interest in a portion you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim.

[15] And the learned Lord President further explained:

> must according to sub-s (2) of s 323 apply by Form 19B. In that form (verified by a statutory declaration) he must specify the nature of the claim on which his application is based and whether the caveat is to be expressed to bind the land itself or a particular interest only...
>
> A caveat is not final and conclusive, that it is like an interim injunction and its purpose is only to preserve the status quo pending the taking of steps by the caveator to enforce his claim.

[16] A caveat thus resembles an equitable remedy.

[17] In *Tan Heng Poh* the Supreme Court opined that *Vangedaselam's* case correctly applied the law as it then stood under s 322(1) of the NLC.

[18] *Tan Heng Poh* was critically analysed by the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345, which came to the finding that the proviso of s 322(1) of the NLC is purely declaratory of the principles enunciated in *Vangedaselam* and not to nullify that judgment and went on to hold that:

> The proviso to s 322(1) prohibits the entry of a caveat over part of the land, but says nothing about the validity of a caveat over the whole land which is limited to protect a registrable interest in a portion thereof, the proviso must be read having regard to the section itself and the Code as a whole. *To, say that the proviso prohibits a caveat to*

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A *protect an interest in part of the land would mean that dealings in... part of the land, which are permitted under the Code, would not be capable of being protected by caveat.* (Emphasis.)

B **[19]** The Federal Court then held that the remarks of Azmi SCJ in *Tan Heng Poh* stating that the only reasonable interpretation to the then provisd in s 322(1) of the NLC is to prevent the registrar from entering a caveat if the caveator's claims an interest under s 322(1) relates only to part of the land, as mere obiter dicta, which was thus hot followed.

C **[20]** The principle of *Farlim* and *Vangedaselam* is now settled law. It has since been legislated in the form of the current proviso to s 322 of the NLC vide A1104/2001 and it says:

D Provided that where the claim is in respect of a part of the land, the caveat binds the whole land and where the claim is in respect of an undivided share of the land, the caveat binds the whole of the undivided share in the land.

E **[21]** A caveat must thus bind the whole land itself and applying that principle to the facts here, the appellant would have to caveat Lot 5105 itself which included those portion in the land on which the appellant had no caveatable interest, in order to protect its (the appellant's) interest in the overlapping portion of the land.

F ISSUES AND SUBMISSIONS

[22] The respondent's contention was that the caveat entered by the appellant was defective in both form and substance. In form because the appellant had used an outdated Form 19B which has now been superseded by the current form provided under Act A1104/01. The form used did not include para 3(c) of s 323 of the NLC which states:

G (c) if relating to a part of the land, a description or a plan of the land affected, or if relating to an undivided share in the land or part thereof, a description thereof.

H **[23]** And in substance because the appellant had failed to delete either of the descriptive word found in Form 19B, ie 'tanah sendiri/kepentingan', which omission resulted in creating an uncertainty in the nature of the caveat ie whether one binding the land or just a particular interest. As such the effect of the caveat cannot be defined as required under s 322(2) of the NLC. Backing this proposition the respondent relied on *HSBC Bank (M) Bhd v Asia Transport Service (M) Sdn Bhd* [2001] 5 MLJ 94 and in particular, this passage was read to us:

I

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It was imperative for the defendant to have stated in the Form 19B, by deleting eitMer 'sendiri' or 'kepentingan yang tersebut dalam jadual itu', his intention that the caveat is to bind the land itself or merely a particular interest in the land.

[24] It was also argued that the appellant had typed out the word 'semua' instead of 'sebahagian' in the fourth column of the schedule in Form 19B, although the appellant was concerned only with a small portion of the respondent's land ie the overlapping boundary area. This has thus caused a confusion to the public at large and to the respondent as to the true purport of the said caveat. Thus the appellant was in breach of s 322(2) of the NLC.

[25] These defects, it was submitted is therefore fatal causing the caveat to be defective (*Infra Elite Development Sdn Bhd v Pacific Treasure Land Sdn Bhd* [2002] 6 MLJ 545). This ineffectual caveat cannot thus be maintained; it has prejudiced the respondent and must be removed.

ANALYSIS

[26] We have carefully perused the Form 19B used by the appellant as well as the statutory declaration accompanying it. In the statutory declaration the appellant had clearly:

(a) described in para 2 (the grounds of claim) in Form 19B that his claim was only to protect the affected land ie overlapping part of the land; and

(b) submitted a plan together with the Form 19B which clearly identified the land affected ie the overlapping part of the land, (the overlapping part of the land was highlighted in the plan).

[27] Reading both the form and statutory declaration together, we find that the appellant had substantially complied with the requirements of Form 19B, and that the deviation due to the failure to describe the land in the form itself should not be a ground to invalidate the form. In our considered view, the respondent was neither prejudiced nor misled by the deviation found in the Form 19B used by the appellant here. The deviation has no substantial effect, (see *Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd* [1984] 1 MLJ 115; [1984] 1 CLJ (Rep) 363).

[28] Section 62 of the Interpretation Acts 1948 and 1967 also provides that usage of a form that deviates from any prescribed form shall not be invalidated by reason only of the deviation if the deviation has no 'substantial effect and is not calculated to misled'. Which is the state of the appellant's Form 19B as we found it.

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[29] The doctrine of substantial compliance is also embodied in s 207 of the NLC which, although concerning instruments of dealing, may also be applicable to a caveat situation especially in respect of usage of a prescribed form such as Form 19B. The proviso to s 207 of the NLCstates:

> Provided that the form so specified for any dealing may, so long as the variation is not in a matter of substance, be used in any particular case with such adaptations, alterations or additions as may be rendered necessary by the character of the parties or other circumstances of the case.

[30] Under the Rules of the High Court, the court may disallow a preliminary objection on the ground of non-compliance of the rules of court if such non-compliance has not occasioned a substantial miscarriage of justice (see O 2 r 3 of the RHC). It emphasises the principle that justice shall not be defeated by a failure to comply with a rule of procedure or forms.

[31] The courts have drawn a close analogy between caveats under the torrens system and a statutory injunction of an interlocutory nature. The corollary is that caveats are available in appropriate cases for the interim protection of the rights in title to land or interest, alleged by the caveator but not yet proven (see *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212). The only difference is that in caveats it is issued ex parte by the registrar in his administrative capacity. Since an interlocutory injunction is an equitable remedy it would seem inappropriate to apply a rigid and ritualistic approach to caveats. A better approach, as suggested by learned counsel of the appellant and with whom we agree, is the 'in the best interest of justice' approach as taken in Australia and New Zealand, under which the torrens system also operates.

[32] Case laws from both those countries have held that substantial compliance with the relevant form is sufficient and that 'a slavish adherence to prescribed form was not required' as can be discerned from this passage in the book *'Caveats Against Dealings in Australia and New Zealand'* by Shannon Lindsay which equally describes the legal position in our country:

> In most jurisdictions a caveat must be in the form as set out in the legislation or in a prescribed or approved form. It has been held in both Australia and New Zealand that substantial compliance with the relevant form is sufficient. In *Investment & Merchant Finance Corp Ltd v Kirkwood Estates Ltd* Ward J considered that use of the prescribed form was not mandatory. In *Hazelwood v BP Australia Ltd* Cox J commented, in relation to the form of caveat prescribed in Tasmania, which contemplates that the details of the caveator's claim will be set out in columns, that the mere failure to complete these columns was not fatal where the information was clearly stated on the face of the caveat. A similar view has been taken in New Zealand. In *New Zealand Mortgage Guarantee Co Ltd v Pye*, Vautier J held that slavish adherence to the prescribed form was not required.

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> It should be also noted that in addition to the provisions found in the Torrens title legislation in some jurisdictions to the effect that a variation from a prescribed form which is not a matter of substance does not affect the validity of the form, there is legislation in all of the Australian jurisdictions providing that strict compliance with prescribed forms is unnecessary. The precise wording of the legislative provision varies, but generally they provide that substantial compliance is adequate.

[33] We are of the view that a liberal and more progressive approach should be taken in the interpretation of caveat forms. The various statutory provisions under the NLC and the RHC which we earlier referred to support this liberal interpretive approach. We may add that even a common sense approach would bring the same conclusion. The accompanying statutory declaration may also be looked at in determining the form's actual purport. The form should not therefore be viewed in isolation. The court should place more weight to the substance rather than form. Dato Davidson of counsel for the appellant had candidly admitted that a wrong form (ie the old version) had been used in the appellant's application but maintained that substantially there had been conformity with the old form. We agree with him.

[34] Next, we remind ourselves that a caveat is neither final nor conclusive. It is in essence a temporary equitable remedy, just like an interim injunction, provided to maintain the status quo of the parties. As such, the balance of convenience factor should be considered and determined upon any application for its removal. The courts below have failed to give any consideration to the balance of convenience (balance of justice) test in removing the appellant's caveat, as formulated in *Murugappa Chettiar Lakshmanan v Lee Teck Mock* [1995] 1 MLJ 782.

[35] We hold that this failure amounts to a serious misdirection on the part of both courts below. In that case it was held that:

> In order to sustain a caveat, a caveator must first pass through three stages: (i) whether he has disclosed a caveatable interest in his application under s 323(1) of the Code; (ii) if he has established a caveatable interest, then, whether the evidence produced in support of his claim discloses a serious question to be tried; and (ii) if both questions are resolved in the caveator's favour, then whether the balance of convenience or justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

[36] Having determined that the appellant possesses a caveatable interest and that a serious question to be tried is disclosed, (ie that the claim is neither frivolous nor vexatious) and after resolving both those questions in the appellant's favour, the courts below should have proceeded to enquire if the balance of justice favours the caveat remaining on the register pending disposal of the action. In apt cases, justice calls for the preservation of that status quo

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until the trial of the action. In our view this is such a case. A failure to conduct that enquiry has been held to amount to a misdirection. Lord Diplock in his opinion in *Eng Mee Yong*'s case made this observation on such a misdirection:

> This may be why in the Malaysian cases about applications under s 327 to which Their Lordships have been referred there does not appear to have been any reference to balance of convenience. They are concerned with what, if anything, the caveator has to prove in order to resist the caveatee's application for removal of the caveat. In the instant case too the learned High Court judge never reached the question of the balance of convenience.

[37] Further, the balance of justice consideration is reinforced by the phrase 'the court may make such order on the application as it may think just' found in s 327(1) of the NLC itself.

[38] For these reasons, this appeal is allowed with costs to the appellant. The orders made in the courts below are set aside.

Appeal dismissed with costs and orders made in the courts below set aside.

Reported by Ashok Kumar